

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSHUA WILLIAM BOWER, a/k/a ANTWAN
WILLIAM,

Defendant-Appellant.

UNPUBLISHED

December 21, 2006

No. 263438

Wayne Circuit Court

LC No. 05-003278-01

Before: Borrello, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony-second offense, MCL 750.227b, possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), and resisting and obstructing a police officer, MCL 750.81d(1). Defendant was sentenced to 23 to 60 months for the felon in possession of a firearm conviction, five years for the felony-firearm conviction, 23 to 48 months for the possession of less than 25 grams of cocaine conviction, and 16 to 24 months for the resisting and obstructing a police officer conviction. We affirm.

Defendant raises issues of the effective assistance of counsel on a number of points. None has merit. The question of whether the defendant has been deprived of the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*:

Two Detroit police officers pulled into a gas station parking lot at the same time as defendant and "ran the vehicle [driven by defendant] in [the] lien system." Defendant was the only occupant of the car. Although the plate "came back to . . . a rental agency . . . [and] did not come back stolen," the officers suspected that the vehicle was stolen because the South Carolina plates on the vehicle, a 2005 Sable, belonged to a different vehicle, a 2004 Dodge.

When they approached defendant and asked him questions about the car and the plates, defendant did not answer, became "combative and uncooperative," asked why they were "messing with him," and tried to walk away to another vehicle parked in the gas station. Defendant's demeanor amplified the officers' suspicion that the car was stolen, and they asked defendant to put his hands on the police car or tried to put defendant on the police car.

Defendant did not comply, began to fight, “tried to elbow” one of the officers, and took off running. They gave chase and ordered defendant to get on the ground; when he did not comply, the officers “assisted him to the ground”.

After the officers apprehended defendant, they went back to defendant’s car and observed a pack of crack cocaine on “the front driver’s floor board,” and “a [loaded] handgun underneath the driver’s seat.” No one else was in the vehicle, and defendant did not produce any documentation of his ownership of the vehicle. At trial, it was stipulated between the prosecution and defense that defendant was convicted for a prior felony and did not qualify to possess a handgun.

Our review of the record convinces us that when viewed in the light most favorable to the prosecution, the evidence presented at trial, and the reasonable inferences arising from it, were sufficient to persuade a rational trier of fact beyond a reasonable doubt that defendant had constructive possession of the gun and drugs and resisted arrest. See *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Although there was no evidence that defendant owned the car or gun, there was sufficient evidence to show that he constructively possessed the gun and cocaine.

Defendant was the sole driver and occupant of the vehicle, and thus, had exclusive control over the vehicle. The drugs were found on the car floor, in front of the driver’s seat, in plain view, and the gun was located underneath the driver’s seat, readily accessible to defendant. The jury could infer that defendant knew of and exercised dominion and control over the cocaine. The jury could also infer that defendant knew the location of the pistol given that it was found under the driver’s seat. In addition, the gun was readily accessible to defendant. Moreover, when the police officers asked him questions about the car, defendant fled. Flight, although not direct evidence of guilt, is “admissible to support an inference of ‘consciousness of guilt.’” *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). Defendant’s flight, in conjunction with defendant’s control over the car, the location of the gun and drugs, and the reasonable inferences arising from this evidence constituted satisfactory proof from which a jury reasonably could conclude that defendant possessed the gun and drugs.

Viewed in a light most favorable to the prosecution, the evidence presented at trial was also sufficient to permit a rational jury to conclude that defendant was guilty of resisting and obstructing a police officer. Defendant failed to answer the police officers’ questions, disobeyed their order to put his hands on the car, began to fight, “tried to elbow” one of the officers and fled. During the pursuit, when ordered to get on the ground, defendant did not comply, and had to be assisted to the ground. This evidence was sufficient to establish that defendant’s conduct amounted to resisting and obstructing a police officer.

Defendant’s claim that he would have prevailed on a motion for a directed verdict is simply unsupportable on this record. Because the defense counsel is not required to advocate meritless positions or bring meritless motions, counsel’s assistance was reasonable according to the prevailing professional norms. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Moreover, defendant cannot show prejudice. *People v Toma*, 462 Mich 281, 309; 613 NW2d 694 (2000).

Defendant's final claim of ineffective assistance of counsel based on failure to object to the court's sentence on the basis of OV 19 scoring is likewise without merit. Defendant did not show that his counsel's failure to object to the scoring of OV 19 amounted to deficient performance and, but for counsel's failure to object, the sentence would have been different.

Even assuming that OV 19 should have been scored at zero, defendant failed to show that his counsel's failure to object to the scoring of OV 19 prejudiced him. Resentencing is not required if it is clear that the trial court would have imposed the same sentence regardless of the scoring error and the sentence falls within the appropriate guidelines range. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

Scoring OV 19 at zero rather than 15 changes defendant's minimum sentence guidelines range from 10 to 23 months to 7 to 23 months. See MCL 777.66. Defendant's sentence for the felon in possession of a firearm conviction was 23 to 60 months. Although the claimed scoring error changes the bottom of the guidelines range, the top of the range remains unchanged. The trial court sentenced defendant to the top of the guidelines range, i.e., 23 months, when the guidelines were scored at 10 to 23 months. It is clear that the trial court would have imposed the same top-of-the-guidelines sentence even if the correct guidelines would have been 7 to 23 months, and the sentence was within the appropriate guidelines range. We conclude that there is no reasonable probability that, but for counsel's failure to object on the basis of this alleged scoring error, the outcome would have been different. Therefore, defendant failed to demonstrate ineffective assistance of counsel.

Affirmed.

/s/ Stephen L. Borrello

/s/ Janet T. Neff

/s/ Jessica R. Cooper